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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

The Merger of MCI Communications
Corporation and British
Telecommunications plc

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GN Docket No. 96-245

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COMMENTS OF ACC CORP.

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SUMMARY

ACC Corp. ("ACC") urges the Federal Communications Commission ("FCC") to grant the merger application of British Telecommunications plc ("BT") and MCI Communications Corporation ("MCI") only on the condition that BT is required to take measures to ensure that it cannot leverage its control over bottleneck access in the U.K. local loop and in submarine cables landing in the United Kingdom to the detriment of ACC and other competing carriers. BT's control over these bottlenecks provides BT with the incentive and the ability to act anticompetitively. In order to restrain BT, the FCC should condition grant of the merger request on BT implementing equal access and non-geographic number portability, and providing access to submarine cable capacity at reasonable and nondiscriminatory rates, terms and conditions, and on a timely basis.

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COMMENTS OF ACC CORP.

I. INTRODUCTION

ACC Corp. ("ACC"), by its undersigned counsel, submits these comments on the Application and Notification filed by MCI Communications Corporation ("MCI") and British Telecommunications plc ("BT") requesting approval by the Federal Communications Commission ("FCC" or "Commission") to transfer control of MCI to BT. ACC, through its subsidiaries, provides domestic and international resale and international facilities-based telecommunications services in the United States, and is a reseller of telecommunications services in the United Kingdom ("U.K.") and Canada. ACC's U.K. subsidiary recently received an International Facilities License ("IFL") in the United Kingdom. As a U.S. carrier providing facilities-based and resale service in both the U.S. and the U.K., ACC has a significant interest in the proposed merger between BT and MCI.

If the FCC grants BT/MCI's merger request, the agency should condition its approval and work with OFTEL to ensure that U.S. carriers have reasonable and nondiscriminatory access to bottleneck network elements over which BT currently has control. In particular, BT should be required to offer all competing long distance and international carriers equal access to customers on

BT's local loops. BT should also be required to offer non-geographic number portability. Finally, BT should be required to offer IFL licensees reasonable and nondiscriminatory access to digital cross-connect switches, which should include access to DXC ports at speed increments chosen by the customer rather than BT. ACC believes that, absent these measures, U.S. carriers do not have effective competitive opportunities to compete with BT in the U.K. international services market which would adversely affect competition in the U.S. international services market.

II. DISCUSSION

Before a foreign carrier with market power in the destination country can provide service between the United States and a destination country, the FCC must find that the destination country offers U.S. carriers effective competitive opportunities ("ECO"). A country satisfies the ECO test if: (1) U.S. carriers are legally permitted to offer international facilities-based services in the foreign country; (2) there exist reasonable and nondiscriminatory interconnection charges, terms and conditions and adequate means to monitor and enforce these conditions; (3) there exist competitive safeguards in the foreign country to protect against anticompetitive practices; and (4) there is an effective regulatory framework in the destination country.¹ In addition to these specific factors, the foreign carrier's U.S. market entry must be consistent with the U.S. public interest in general.

As detailed below, because U.S. carriers competing in the U.K. marketplace do not enjoy access to U.K. customers and submarine cable facilities equal to that of BT, the FCC cannot find that the U.K. is fully competitive absent (1) implementation of an equal access system by BT; (2)

¹ *Market Entry Order*, ¶ 6.

BT's provision of submarine cable digital cross-connect facilities to competing carriers on a reasonable, nondiscriminatory, and timely basis; and (3) implementation of non-geographic number portability in the U.K.

A. The FCC Should Condition Approval of the Merger on BT's Implementing Equal Access.

1. Equal Access is Not Available in the U.K.

Equal access allows a customer of a local exchange company to access its preferred long distance company on a nondiscriminatory basis. Dialing parity, one form of equal access, allows a customer to dial the same number of digits to access every carrier.

In the U.S., equal access has proven to be a vital element in ensuring fair competition in the telecommunications market. The Commission has repeatedly acknowledged the beneficial impact equal access has had on the long distance market. Commissioner Reed Hundt recently noted that equal access was a critical component to the opening of the long distance market in the U.S.² Furthermore, the Commission's *Interconnection Order* recognized that "after equal access was deployed throughout the country, the number of customers using MCI and other long distance carriers increased significantly."³ This increased usage of competing carriers, as well as the introduction of additional carriers, exerted substantial downward pressure on market prices.

² *The Hard Road Ahead -- An Agenda For the FCC in 1997*, Reed E. Hundt, Chairman, 1996 WL 736922 (Dec. 26, 1996) (Dialing parity "is as critical a component to opening up short-haul toll markets as equal access was for long distance markets a decade ago.").

³ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 95-98, ¶ 17 (rel. Aug. 8, 1996) ("*Interconnection Order*").

By contrast, under the U.K.'s system of indirect access, competitors to BT's long distance services have inferior access arrangements. A customer may access BT's long distance services merely by dialing the number the customer seeks to call, without dialing additional numbers or providing additional information. If a customer chooses to use another long distance provider, however, that customer must, on a per call basis, dial extra digits or follow additional procedures in order to route calls over the second operator's network.⁴

Despite the proven pro-competitive effect of equal access, OFTEL has to date declined, as a matter of policy, to implement an equal access regime on the basis that the costs of implementing equal access outweigh the benefits. OFTEL's expressed concern is that mandating equal access would reduce the incentives for BT competitors to construct alternative local infrastructure. OFTEL also believes, moreover, based on a cost-benefit analysis conducted by an independent research firm, that the overall economic benefit of requiring BT to introduce equal access is negligible. Therefore, OFTEL has not replaced the current system of indirect access with mandatory equal access.

The disparity between the U.S. system of equal access for all carriers and the U.K. system of inferior access for all carriers other than BT is especially ironic given that BT provides both local and long distance services through the same company. The FCC recognized the critical importance of equal access to the development of a fully competitive market in the context of a marketplace in which divestiture of the local exchange carriers by the dominant long distance carrier had already

⁴ Although ACC does not object to the requirement that its customers dial additional digits to access its network *per se*, this requirement should apply on an even-handed basis across the board to all carriers, including BT.

occurred. ACC submits that equal access is even more imperative in the U.K. than it is in the United States.

2. Unequal Access Has an Adverse Effect on Competitiveness.

a. The U.K.'s Indirect Access Policy Discriminates Against U.S.-owned Competing Carriers

The U.K.'s indirect access policy discriminates in favor of BT and against U.S.-owned and other competing carriers because it effectively limits the ability of customers to choose long distance companies other than BT. Although indirect access technically allows customers to access U.S.-affiliated carrier networks, the customer faces a greater burden in dialing a carrier other than BT. Moreover, customers may feel the requirement to input additional digits somehow suggests that the service quality of competing carriers is inferior. In the *Modification of Final Judgment*, the court recognized that, prior to the introduction of equal access, "substantial disparity in dialing convenience has had a significant negative impact on competition."⁵

Moreover, OFTEL's policy of indirect access allows BT in fact to receive revenue the customer may have intended for competing carriers. Although a customer may prefer the long-distance service of a U.S.-affiliated carrier, there is a substantially greater chance that it may frequently, inadvertently use BT's service. ACC recently completed a survey of residential customers who had signed up for but who had failed to use its service. The reasons nearly half of those customers gave for "zero-billing" include: (1) forgetting to dial the access code; (2) being confused about how to use the code; (3) forgetting that they had signed up for the service; or (4) finding the method of access inconvenient. Consequently, ACC's customers used BT's service

⁵ *United States v. AT&T*, 552 F. Supp. 131, 197 (D.D.C. 1982).

instead of ACC's purely by default and through the inadequacy of the access system. In all of these cases, had equal access been in place, it is almost certain that those calls would have been routed over ACC's network, not BT's.

Not only do U.S.-affiliated carriers like ACC lose "default" revenue to BT, but also they incur additional substantial costs when they try to compensate for the inferior arrangement. "Dialers" or PBXs can be used to provide a customer direct access to a long distance carrier other than BT. However, this equipment significantly increases the costs as well as the burden to competing carriers who want to provide direct access service in the U.K. For instance, to date, in the U.K. alone, ACC and other carriers lacking the benefits of equal access have incurred significant expenses to install dialers on customer premises and to provide least cost routing programming and related maintenance costs. These expenses are in addition to the less quantifiable, but nevertheless significant, staff costs of marketing, sending engineers to install dialers, and coordinating customer requirements. The natural confusion and lack of preparedness on the part of customers further exacerbates the problem. In addition to these costs, OFTEL is reviewing the possibility of imposing a surcharge when customers use indirect services to reach their preferred long distance carriers. Added charges would further discourage customers from using the services of competing carriers and therefore increase BT's market dominance.

BT is the only carrier that is required to provide indirect access. The recently announced merger between Mercury Communications and three cable-TV firms, NYNEX CableComms, Bell Cablemedia and Videotron, will likely result in Mercury's becoming the long distance carrier of choice for most alternative local infrastructure providers. Since OFTEL does not require the cable companies to provide indirect access to unaffiliated long distance carriers, they may openly

discriminate against competing carriers and limit their customers' long distance access to Mercury. Indeed, at the time of writing, no customers of any alternative local loop provider can access ACC. Cable companies have now passed more than one-third of homes in the U.K. and, in some franchise areas, the subscription rate is as much as 30%. This is a significant proportion of customers to which ACC does not have access. In the likely absence of an alternative means to access customers, therefore, it is critical that competing carriers have equal access to U.K. customers through BT.

b. Absent Equal Access, U.S.-affiliated Carriers Cannot Provide True End-to-End International Service in the U.K.

In addition, the lack of equal access greatly reduces ACC's ability to provide the competitive end-to-end services between the United States and the United Kingdom that the FCC established the ECO test to encourage. The Commission has recognized that "[i]f there is no opportunity for U.S. participation in competitive markets abroad, then the benefits of providing international service on an end-to-end basis will flow solely to a dominant foreign carrier and its U.S. affiliate."⁶ If the FCC approves BT's proposed merger with MCI, BT/MCI will be able to provide end-to-end service between an end user in the United States and an end user in the U.K. Customers will be able to access the BT/MCI network using 1+ dialing in both the United States and in the U.K. In order for a U.K. customer to use the ACC network to make the same call, however, the customer would have to dial additional digits or provide additional information. This *de facto* inability to provide end-to-end service may also discourage carriers from entering the U.S.-U.K. market, further undermining the FCC's competitive goals.

⁶ See *Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd 3873, ¶ 15 (1995) ("Market Entry Order").

3. Absent Implementation of Equal Access, the U.K. Does Not Satisfy the ECO Test

As discussed above, without equal access, a U.S.-affiliated carrier cannot provide truly competitive end-to-end U.S.-U.K. services in competition with BT, which adversely affects the level of competition in the U.S. market, and the prices paid by consumers. The Commission would be hard-pressed to find, for example, that ACC's interconnection with BT's local access facilities is nondiscriminatory, given that the U.K. regime for interconnection to the local exchange inherently favors the incumbent service provider, BT.

Moreover, the evidence presented in this petition demonstrates that other carriers will not be able to compete on an equal level with BT in the provision of end-to-end U.S.-U.K. services absent equal access. Given the potential harm to U.S. carriers if BT can enter the U.S. market uninhibited by a system of equal access at home, the FCC should grant the Application only on the condition that BT implement equal access in the near future.

4. Approval of the Merger Must be Conditioned on BT's Offering Equal Access

Although ACC does not object to the proposed transfer of control, it is concerned that the U.K.'s indirect access policy will allow BT to leverage its control over the local loop bottleneck to the detriment of U.S. carriers. Requiring BT to implement equal access in the U.K. would eliminate the single greatest barrier to full and free competition between the United States and the United Kingdom and permit a finding of ECO in the U.K. The FCC has repeatedly acknowledged that the introduction of equal access in the U.S. long distance market "had a substantial pro-competitive

impact,”⁷ resulting in increased competition, cheaper prices, greater innovation and increased network usage. Therefore, ACC respectfully requests the Commission to condition any approval of the proposed transaction on BT’s offering competing long distance companies equal access. Such a condition would promote the Commission’s three priority goals in regulating the U.S. international telecommunications market: (1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets.⁸

B. The FCC Should Condition Approval of the Merger on the Implementation of Non-geographic Number Portability in the U.K.

While ACC commends OFTEL on its implementation of geographic number portability and its support for number portability in general, ACC believes that, until the U.K. implements full number portability, BT will continue to have a significant advantage over competing international carriers. ACC therefore urges the FCC to condition its grant of the BT/MCI merger on the expeditious introduction of full number portability by BT in the U.K.

Number portability is an essential element in the establishment of telecommunications competition. In its decision regarding number portability, the U.K. Monopoly and Mergers Commission noted that number portability is a necessary element in promoting competition between operators. In the United States, the FCC has held that “number portability ... promotes the

⁷ *Interconnection Order*, ¶ 17.

⁸ *Market Entry Order*, ¶ 6.

development of competition among alternative providers of telephone and other telecommunications services.”⁹ Indeed, competition in the provision of 800 services became vigorous only after the FCC introduced 800 number portability (which, in the U.K., falls within “non-geographic” number portability).

Given the clear importance of non-geographic number portability to competition, BT should be required to offer such portability as soon as possible. Although OFTEL is encouraging the introduction of non-geographic number portability, geographic number portability was not offered in the U.K. until approximately two and one-half years after initial discussions began on the subject. Such discussions began with respect to non-geographic number portability in late 1996, and the initial trials will not occur until at least March 1997. ACC is concerned that absent further OFTEL action, ACC will have to wait some considerable time before customers would be able to subscribe to ACC’s 800 and other services without changing their telephone numbers. Given the clear benefits of number portability, the FCC should not find that the U.K. offers U.S. carriers effective competitive opportunities until non-geographic number portability is available in the U.K.

C. The FCC Should Condition Approval of the Merger on BT’s Making Available, on a Reasonable, Non-discriminatory, and Timely Basis, Digital Cross-Connect Capacity at BT-Administered Submarine Cable Stations

BT’s control over access to essential submarine cable landing station facilities provides BT with substantial incentive and ability to restrict ACC from competing effectively on the U.S.-U.K. route. As a new international facilities-based carrier, ACC will require capacity in submarine cables. If it cannot obtain such capacity at the same rates and on the same terms and conditions enjoyed by

⁹ *In the matter of Telephone Number Portability*, CC Docket No. 95-116, 11 FCC Rcd 8352 (1996)

BT, it will be disadvantaged competitively. Given BT's control over bottleneck access to such submarine cables, it is not at all clear that BT will be willing to offer ACC reasonable, nondiscriminatory, and timely access to ACC's capacity. This uncertainty makes it imperative that, until it is proven that OFTEL will take swift and decisive action to protect carriers such as ACC, the FCC impose conditions or establish a procedure for ensuring adequate oversight of BT's management of submarine cable landing station facilities on a going-forward basis.

In order to access its capacity on a submarine cable, a carrier must arrange to route calls over a digital cross-connect switch ("DXC"). These facilities, which are located within the submarine cable landing station, translate optical signals coming off the undersea cable into signals compatible with backhaul facilities leading from the submarine cable to a carrier's domestic network. Due primarily to the need to obtain planning and other consents, as well as government authorizations, it is unlikely that new cable stations will be established soon. Thus, the entity which controls the existing submarine cable stations, BT, is the entity which controls access to DXCs.

Since the DXC is a bottleneck facility, BT has a special responsibility to provide access to it at cost-based and nondiscriminatory prices and on a timely basis. While DXC access has been made available, ACC does not have any indication whether such access would be provided at cost-based prices. In most cases, moreover, capacity ports have been made available in units of 140 Mbps and not the more accessible 2 Mbps. New entrants wishing to take less than 140 Mbps must take capacity for backhaul from the cable station owner to an international transmission center ("ITC"). This capacity is available only from the backhaul provider. Accordingly, both the DXC and, in most cases, the backhaul capacity must be provided by the manager of the DXC.

Given BT's control of bottleneck access in this area, it is essential that OFTEL closely monitor BT's behavior in managing access to cables and providing backhaul. If it grants the proposed merger, the Commission must do so only on the condition that BT not abuse its control of this bottleneck. The FCC should maintain this condition until it is clear that OFTEL has successfully limited the ability of BT to act anticompetitively.

III. CONCLUSION

For the foregoing reasons, ACC Corp. respectfully requests that the FCC approve the merger of BT and MCI only on the condition that BT consent to offering competing long distance companies equal access, including dialing parity, within the near-term.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was sent by hand delivery or by United States first-class mail, postage prepaid (indicated by *), on this 24th day of January, 1997, to the following parties:

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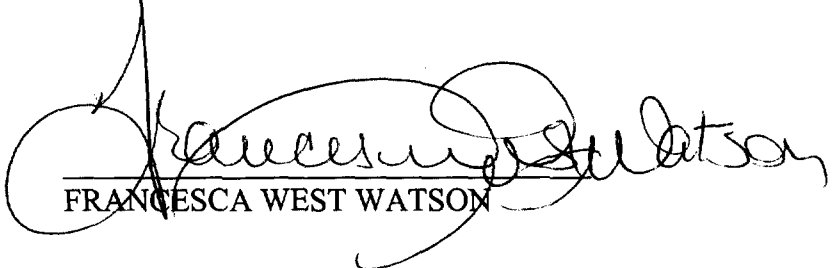
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